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No. 82-5298

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ANDRES SEGURA and LUZ MARINA COLON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered November 6, 1981, and June 29, 1982.

CITATIONS TO OPINION BELOW

The decision of the District Court, dated May 15, 1981, is found in Appendix A hereto. The interlocutory decision of the Court of Appeals, dated November 6, 1981, and reported at 663 F.2d 411 (2nd Cir. 1981) is found in Appendix B hereto. The decision of the Court of Appeals affirming the convictions is found in Appendix C hereto.

JURISDICTION

The Court of Appeals judgment reversing, in part, the District Court's suppression of evidence, was entered November 6, 1981. The Court of Appeals judgment affirming the convictions was entered June 29, 1982. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the introduction into evidence of contraband seized after a 19-hour hiatus between the illegal entry into

and seizure of petitioners' dwelling and the obtaining of a search warrant violates the Constitutional requirement that a magistrate find probable cause and issue a warrant before the police violate the privacy of the home?

2. Whether the government's affidavit in support of the warrant to search petitioners' dwelling contained material misrepresentations without which there was no probable cause for the issuance of the warrant?

PROVISIONS INVOLVED

1. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." United States Constitution, Amend. IV.

2. "No person shall . . . be deprived of life, liberty, or property, without due process of law." United States Constitution, Amend. V.

STATEMENT

In January, 1981, members of the New York Drug Enforcement Task Force received information that certain persons were dealing in cocaine from an apartment located at 12-10 Astoria Park South, Queens, New York. Undertaking physical surveillance of the building, the agents ascertained that the occupants of the apartment were petitioners Segura and Colon. On February 7, 1981, petitioners were observed moving into a new apartment located at 37-07 147th Street, Apartment 3-D, Queens, New York. The 147th Street apartment was located on the third floor of a high-rise building, in the rear of the building. It is this apartment which the agents entered on February 12, 1981.

Between January 26, 1981, and February 12, 1981, petitioners were kept under surveillance by the government agents. Although the petitioners were seen together at times, and lived together in the same apartment, most of the surveillance was dir-

ected toward petitioner Segura, who was seen on many occasions outside the presence of petitioner Colon.

On January 26, 1981, Segura was seen operating a red Datsun station wagon. On January 29, 1981, Segura was seen acting "suspiciously" in meeting with a person outside his apartment building. On February 8, 1981, Segura was seen meeting with a "known drug violater" and driving to Brooklyn with him. On February 9, 1981, Segura was seen driving his car to a motel in Queens and meeting with Enrique Rivudalla-Vidal. On all of the above-mentioned occasions petitioner Segura was seen either alone or with persons other than Colon.

On February 12, 1981, the agents trailed Segura and Colon from their 147th Street apartment to the Burger King restaurant located at 222nd Street and Northern Boulevard in Queens, and observed them enter the establishment. Not long afterwards, Rivudalla and Esther Parra drove into the Burger King parking lot and parked near Segura's car. Rivudalla entered the Berger King and sat down at a table with Segura. Colon was seated nearby. Shortly thereafter, Colon left the restaurant carrying a large shoulder bag. The bag appeared to the agents to be bulging in the middle. Colon then entered the car in which sat Esther Parra, and exited it shortly thereafter, "zippering-up" the shoulder bag, which the agents observed to be noticeably smaller in bulk then when she was observed entering the car.

As a result of this suspicious activity, the agents dropped their survellance of Segura and Colon, and instead followed Rivudalla and Parra to a residential area of Jackson Heights, Queens. As Rivudalla and Parra exited their vehicle, the agents conducted a Terry stop of them and subsequently discovered one-half of a kilogram of cocaine in a paper bag that was being carried by Parra. Rivudalla and Parra were immediately arrested and taken to DEA headquarters in Manhattan for processing. The arrest of Rivudalla took place at approximately 5 p.m. on February 12, 1981.

At about 6 p.m., Rivudalla told the agents that he had received the cocaine on consignment from Segura earlier that day

at the Burger King. Originally, Rivudalla was to receive one kilogram of cocaine from Segura, but that plan was reduced to a half of kilogram because Rivudalla was not sure that he could dispose of an entire kilogram. Finally, Rivudalla told the agents that Segura was to telephone him at approximately 10 p.m. that day (February 12) to discuss Rivudalla's success in disposing of the consigned cocaine.*

Agent Palombo telephone the United States Attorney's Office, Eastern District of New York, at 6:30 p.m., and requested authority to arrest Segura and Colon and to search their apartment. Assistant United States Attorney Thomas Roth told the agent that a search warrant could not be obtained until the following morning because the Magistrate had gone home. Mr. Roth instructed the agent to attempt to arrest Segura and Colon, and to go to their apartment building and "to secure the premises outside the premises."

At 7:30 p.m. on February 12, Agent Shea and two other officers went to petitioners' apartment house and gained entry into the building by walking in behind a tenant who unlocked the lobby door. At the time of their arrival, the "best information" that the agents had was that the petitioners were not at home. The agents were directly to Apartment 3-D on the third floor. Agent Shea put his ear to the door, and heard no conversations or other noises. It appeared that there were no lights on in the apartment.

From 7:30 p.m. until 10:00 or 10:30 p.m., the agents hid in the fire stairs on the thid floor where they were able to observe petitioners' apartment and also observe anyone enter or exit from the apartment. After about three hours, the agents decided to vacate the fire stairs and go outside to the front of the building to wait for the petitioners to arrive.

At about 11:15 p.m., the agents observed Segura walk to the apartment building. Segura entered the locked vestibule of

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*Because Rivudalla was unavailable at the time of the trial, the conversation between Rivudalla and the agents was not disclosed to the jury.

the building with a key. The officers followed him inside the vestibule and placed him under arrest. Agent Shea searched him, handcuffed him and told him, "Let's go up to the aparment". Segura denied living in the building, but was forced to go up to the third floor with the agents. In the corridor on the third floor, Segura attempted to stop, so Agent Shea had to shove him.

Agent Shea, with his gun drawn but hidden behind his leg, knocked on the door of Apartment 3-D. The door was answered by Luz Marina Colon, who, when she opened the door, was face to face with the three officers and Segura. The agents walked into the apartment without seeking permission, and told Colon that Segura had been arrested and that the agents were "in the process" of obtaining a search warrant for the apartment.

Present in the apartment, besides Colon, were three other persons, all of whom were subsequently arrested and all of whom were subsequently dismissed at the request of the United States Attorney's Office. Immediately upon entering the apartment, two officers went into all the rooms of the apartment, and looked into all of the closets, ostensibly to make sure that no other persons were there. In the course of this "walk-through", the officers saw several jars of lactose and a scale atop a table in the master bedroom. In a closet in the master bedroom, the officers observed several plastic "baggies" of the sort used to keep leftover food.

Within five minutes of the three agents entering the apartment, Agent Palombo arrived and arrested Luz Marina Colon and the three other persons who were there. As the agents prepared to take away the five prisoners, Colon asked for her shoulder bag, which was on a table in the living room. An agent picked up the bag, and upon looking inside, discovered a loaded revolver and two thousand dollars.

Before being taken away, Segura said to the agents: "The stuff in here is mine."

At least two officers remained in the apartment all night "to secure the place".

The next day, February 13, 1981, a two-page search warrant affidavit was prepared by Agent Palombo. The affidavit contained five paragraphs, which may be summarized as follows:

1. At 5:25 p.m. on February 12, 1981, Rivudalla and Parra were arrested in possession of one pound of cocaine.

2. Rivudalla informed agents that he had received the cocaine from Segura at the Burger King restaurant earlier that day.

3. The agents had seen Rivudalla and Segura meet at the Burger King.

4. Segura told Rivudalla that he (Segura) "had an additional quantity of cocaine at his home".

5. At 11:15 p.m., "agents observed SEGURA approach the apartment 3D at the location and attempt to enter. At that time SEGURA was placed under arrest. Following his arrest SEGURA admitted that he kept additional quantities of narcotics in the apartment."

At the suppression hearing, Agent Palombo testified that Rivudalla never made the statement attributed to him in paragraph four, but was an inference drawn by Palombo from Rivudalla's telling him that the original plan had been for Segura to supply Rivudalla with a full kilogram of cocaine.

Agent Palombo further testified that the allegation in paragraph five that Segura "admitted that he kept additional quantities of narcotics in the apartment" was an inference drawn by Segura's statement, while in the apartment in custody of the agents, that "The stuff in here is mine".

The affidavit in support of the search warrant contained no mention whatsoever of petitioner Luz Marina Colon, and no mention of the agents' entry into the apartment the night before, nor of their findings while in the apartment.

The search warrant was approved by a magistrate at approximately 6:00 p.m. on February 13, 1981. After being told over the phone at the impounded apartment that the warrant was signed, Agent Shea supervised its execution at Apartment 3-D.

In the master bedroom, Agent Shea opened an attache case

and found two packages of cocaine totaling twelve hundred fifty (1250) grams, and approximately thirty-nine hundred ($3,900) dollars. The agent searched a coat in the bedroom closet and found in the pocket fifty-eight (58) grams of cocaine and, on a closet shelf, records of purported narcotics transactions. In a search of the second bedroom, the agents found cash in a dresser drawer, eighteen rounds of .38 caliber ammunition in a woman's eyeglass case, and approximately fifty thousand ($50,000) dollars in a box. The above-named items, as well as the scale, lactose, and baggies found by the agents the night before, were removed from the apartment by the agents.

After hearing the testimony of Special Agents Palombo and Shea, Assistant United States Attorney Roth, and defendant Rivadulla, the District Court granted petitioners' motion to suppress in its entirety (Appendix A). The District Court rested its decision on two grounds. First, it found that the initial warrantless entry could not be justified on the basis of any exceptions to the warrant requirement (Appendix A, 12-18). Second, the illegality of the initial entry and arrest of Colon, coupled with the unreasonableness of the delay in securing a search warrant, required the suppression of the evidence seized from petitioners' dwelling. "To validate the search of the apartment under the circumstances of this case would permit Government agents to take advantage of their own wrong." (Appendix A, 22).

On appeal by the government to the Court of Appeals, the District Court's order was affirmed in part and reversed in part. The Court of Appeals held that the entry by the agents into petitioners' dwelling was not justified, and that all items discovered prior to the issuance of the search warrant must be suppressed. However, the evidence discovered pursuant to the search warrant should not have been suppressed, and may be introduced into evidence at petitioners' trial. United States v. Segura, 663 F.2d 411 (2nd Cir. 1981) (Appendix B).

The petitioners' then proceeded to trial in the District Court and were convicted of narcotics offenses.

The Court of Appeals affirmed the convictions, rejecting the contentions of the petitioners that the search warrant was invalid because it was procured on the basis of material misrepresentations and that the convictions were based on insufficient evidence (Appendix C).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Second Circuit upholding the introduction into evidence of contraband seized from a dwelling many hours before a warrant is obtained (App. B) is in direct conflict with the following Court of Appeals and State Court cases: United States v. Griffin, 502 F.2d 959 (6th Cir. 1974), cert. denied, 419 U.S. 1050 (1974); United States v. Allard, 634 F.2d 1182 (9th Cir. 1980); State v. Bean, 572 P.2d 1102 (Wash. 1978); People v. Shuey, 120 Cal. Rptr 83, 533 P.2d 211 (1975); and State v. Dorson, 615 P.2d 740 (Haw. 1980).

Furthermore, the material misrepresentations contained in the affidavit for the search warrant pose additional Constitutional questions dealing with the Warrant Clause of the Fourth Amendment.

In the instant case, after illegally entering and impounding petitioners' apartment at 11 p.m. on February 12, 1981, the officers arrested all of the occupants and stationed several officers inside the apartment to wait for the expected issuance of a search warrant. The search warrant was granted by a magistrate at 6 p.m. on February 13, 1981, approximately nineteen (19) hours after the seizure of the apartment, and approximately twenty-four (24) hours after the police initially made inquiries about obtaining a warrant.

The District Court concluded "that there was sufficient information contained in the affidavit independent of any information that the agents gathered at the time of the illegal entry to justify the issuance of the warrant by the magistrate. In other words, the warrant was valid." (App. A, 18-19). The Court

of Appeals likewise found the warrant to be valid.

The respondent may argue that because the warrant was "valid", the initial illegality of the agents should be excused and the evidence should be admissible. To accept the argument would be to nullify the protections of the Warrant Clause of the Fourth Amendment in that it would allow the police to illegaly enter a dwelling any time they later planned to seek a search warrant. The question of probable cause would be left at the discretion of the police rather than in the hands of an impartial magistrate.

The test for whether to suppress evidence seized pursuant to a warrant executed after an unlawful entry is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 371 U.S. 471, 468 (1963).

The Court of Appeals for the Second Circuit in discussing the exclusionary rule, has stated that there are three possible exceptions to the rule: independent source, inevitable discovery, and the doctrine of attenuation. Each exception rests on the lack of a sufficiently close connection between the state's wrongdoing and the invasion of the defendant's reasonable expectation of privacy. "In each case, we must weight the extent of any illegality, the probative value of any legally obtained information, and the relationship between the two, always with the hope of vigorously enforcing the Fourth Amendment without imposing ineffective constraints on criminal investigations." United States v. Alvarez-Porras, 643 F.2d 54, 60 (2nd Cir. 1981).

Weighing the extent of the illegality, and the close connection between the wrongdoing and the invasion of petitioners' privacy, it is petitioners' position that the "execution" of the warrant in the instant case was not sufficiently distinquishable from the illegality of the initial entry and impoundment of the apartment to be "purged of the primary taint". Wong Sun v. United

States, supra at 488.

In weighing the extent of the police illegality, it must be kept in mind that "the Fourth Amendment is designed to prevent, not simply to redress, unlawful police action." Chimel v. California, 395 U.S. 752, 766 n. 12 (1969). It is respectfully submitted that the Court must fashion an opinion which would prevent, in the future, the kind of police activity that was present in the instant case. "If suppression motions and damage actions were sufficient to implement the Fourth Amendment's prohibition against unreasonable searches and seizures, there would be no need for the constitutional requirement that in the absence of exigent circumstances a warrant must be obtained for a home arrest or a search of a home for objects." Steagald v. United States, 101 S.Ct. 1642, 1649 (1981). The only way to stop this kind of illegal police activity is to, in effect, punish the police for their misconduct.

In terms of the reasonable expectation of privacy of the petitioners, there can be no more of such expectation than in one's home, at nighttime. "It is clear that one's reasonable expectation of privacy in the home is entitled to a unique sensitivity from federal courts." United States v. Reed, 572 F.2d 412, 422 (2nd Cir. 1978), cert. den., 439 U.S. 913 (1978). See also: Cardwell v. Lewis, 417 U.S. 583 (1974).

The extent of the illegality here is further evidenced by the intrusiveness of the police. For the agents to impound petitioners' apartment for nineteen hours awaiting a search warrant that had not even been applied for at the time of the initial entry is unconscionable, particularly in view of the fact that a warrant may be obtained quickly, and may even be done by telephone. Federal Rules of Criminal Procedure, Rule 41(c)(2). The agents "moved in" to the apartment and did not leave until they had achieved their illegal purpose. United States v. Agapito, 620 F.2d 324 (2nd Cir.) cert.den., 449 U.S. 834 (1980).

United States v. Griffin, supra., deals with a fact pattern almost indistinguishable from the facts here. In Griffin, supra., the police had probable cause to search a dwelling, and

when no one answered, they went in, waited four hours for the arrival of the warrant, and then searched the premises. The Court upheld the suppression of the evidence seized from the premises, on the ground that "any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment." Griffin, supra., at 961.

The Court of Appeals for the Second Circuit just recently discussed Griffin approvingly: "In Griffin, the purposes of the exclusionary rule were served by suppressing the evidence, lest the police be encouraged to execute warrants before they have been issued and before they have been properly presented to those persons at the scene of the intended search." United States v. Alvarez-Porras, supra., at 64-65.

The respondent might seek to distinguish Griffin, supra, by arguing that the entry there was "forcible" while the entry here was "peaceful". There is nothing peaceful about opening the door to one's apartment and being faced by several agents, guns drawn (although hidden behind their legs) who demand entry without seeking permission or presenting a warrant. Furthermore, it may be assumed that the agents would have entered the apartment by forcing Segura to unlock the door if no one had responded to their knock, and would have remained there until the hoped-for warrant arrived.

In a case where the police "secured" a hotel room for two hours (as opposed to a home for nineteen hours) while waiting for a warrant to arrive, it was held "that where a defendant establishes that the government illegally 'secured' and thereby seized evidence, and that seizure continues while the government procures a search warrant, the defendant has demonstrated a sufficient nexus between the illegality and the subsequently seized evidence notwithstanding any 'independent source' supporting the warrant." United States v. Allard, supra.

In a recent case in the Second Circuit, a co-defendant was arrested with half of the drugs that he was to sell to an undercover agent. He told the agent that the rest of the drugs

were in the defendant's apartment. The agents went to the apartment, saw a light on, and knocked on the door. The defendant's wife opened the door, and the agents went in and "walked through" the apartment. They did not arrest the wife, but treated her politely while awaiting a search warrant which arrived less than two hours later. The Court held that since the home was "secured" without a warrant, the evidence subsequently seized under a "valid" warrant must be suppressed. The Court noted "that the nature of the intrusion is particularly stark in the instant case because the warrantless entry was into a private residence." United States v. Levine, 500 F. Supp. 777 (W.D.N.Y. 1980). See also: State v. Bean, supra.

Most Courts that have decided this issue have been unable to distinguish the initial illegality of the entry and impoundment of the premises from the later seizure under a presumably valid warrant:

> "Analytically this case can be regarded simply as involving a de facto, inchoate seizure of the person and property of (the defendant) the moment the police began the illegal occupation. Thereafter the obtaining of the warrant could no more operate to disinfect this conduct than if the police had actually seized the individual, items sought to be suppressed prior to acquisition of the warrant." People v. Shuey, supra at 211.

Respondent's argument that the illegal conduct of the police was "peaceful" and that the police acted in "good faith" should not be a determinative factor in this case. In a State Court case that examined these issues closely, the premises were secured by the police in a "peaceful manner". The police made a security "walk-through" but did not search the premises. The police agreed with the occupants of the dwelling that, while awaiting a warrant, the police would leave but would watch the dwelling and its occupants through a window, and that anybody who wanted to leave would be frisked. Despite the "peacefulness" of the entry and impoundment, the Court found that the actions of the police had the effect of sealing the premises and of curtailing the occupants' freedom of movement within the house:

> "What the State proposes would necessarily contemplate that any time the police believe

> they have probable cause to search, however weak the foundation for their belief may turn out to be, they may with impunity intrude upon the privacy of a person's home, so long as they are then in the process of applying for a search warrant. And it would make no difference that a judge might later deny their application. To justify such a procedure, it would have to be presumed that where the police believe they have probable cause, the judge reviewing their application will also find probable cause. This, obviously, would not necessarily be the case. The potential for mischief and grave injustice is clearly evident and such a practice is not sanctioned by the Fourth Amendment. The siege and immobilization of the house and its occupants which lasted for a period of some seven hours before the search warrant arrived was patently inexcusable." State v. Dorson, supra. at 740.

The cases that appear to support respondent's position are distinguishable from the instant case. In United States v. Agapito, supra., for example, the impounded premises were an unoccupied hotel room. As mentioned earlier in this petition, the expectation of privacy in a hotel room is substantially less than that of a house or apartment.*

United States v. Fitzharris, 633 F.2d 416 (5th Cir. 1980) is based, in part, on the doctrine of "inevitable discovery", a doctrine which was rejected by the Second Circuit in United States v. Alvarez-Porras, supra.

In New Jersey v. Fenin, 381 A.2d 364, 154 N.J. Sup. 282 (1977), the defendant, who was arrested outside his residence, was brought back into his residence by the police, and both the police and the defendant awaited the search warrant. By being present while waiting for the warrant, unlike the instant case, the defendant could see to what extent the police conducted a search prior to the arrival of the warrant.

Here, there was nobody but the police in the apartment for nineteen hours. Although the agents testified at the suppression hearing that they did not conduct a full-fledged search until they received notification that the warrant had been signed by the magistrate, their being along in the apartment for so long a

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*The Court of Appeals found Agapito, supra., to be indistinguishable and relied solely upon that case to reverse the District Court's suppression on the evidence. United States v. Segura, 663 F.2d 411 at 416, (App. B).

period of time might well have led to a pre-warrant search that could not be attacked at the suppression hearing by the petitioners because of a lack of knowledge of what went on in the apartment for nineteen hours. It is not being argued that perjury occurred in this case, but that the situation the police found themselves in could lead to mischief and perjury. As the Supreme Court stated years ago, we must always have a check on police activity in regard to searches and seizures:

> "Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home." McDonald v. United States, 335 U.S. 451 456 (1948).

The extent of the police illegality in this case, the entry into a home, at night, without consent and without a warrant, the impounding and remaining in the home for nineteen hours, are inexcusable. "To validate the search of the apartment under the circumstances of this case would permit Goverment agents to take advantage of their own wrong." (App. A, 22). The "hope of vigorously enforcing the Fourth Amendment" can only be achieved by telling the government that the police conduct here cannot and will not be tolerated in a court of law, and that the protection of the Fourth Amendment will not be abrogated by the type of police misconduct shown here.

Petitioners in no way concede that the search warrant was valid. The government's affidavit in support of the warrant contained material misrepresentations without which there was no probable cause for the issuance of the warrant.

Special Agent Palombo submitted willful misrepresentations in support of the warrant to search petitioners' apartment as well as concealing facts necessary for the magistrate's deter-

mination.. This amounted to a complete usurpation of the magistrate's neutral and detached role, and was in complete derogation of petitioners' Fourth Amendment rights.

The false statements are contained in paragraphs 4 and 5 of Palombo's affidavit, as follows:

> 4. . . . Rivudalla further stated that SEGURA had told him that he (SEGURA) had an additional quantity of cocaine at his home. . . .
>
> 5. . . . Following his arrest SEGURA admitted that he kept additional quantities of narcotics in the apartment.

Palombo's suppression hearing testimony revealed his prior knowledge that these representations were untrue, and that the statements attributed to Segura and Rivudalla were, in fact, Palombo's own conclusions.*

> "At this time Rivduller (sic) was asked, did he believe that Segura still had the other half of a kilogram and Rivuduller stated that yes, he believed that Segura still had the other half of kilogram at his house. That was the sum or the essence of the conversation with respect to Segura." ** (P. 342, line 25, p. 343 lines 1-5)***

The knowing falsity as to paragraph 5 was revealed at transcript page 266:

> THE WITNESS: . . . At the time Mr. Segura stood up, looked over toward the other defendants and the statement was to the effect "The stuff in here is mine."
>
> THE COURT: That is not what you say in the affidavit.
>
> THE WITNESS: In my . . .
>
> THE COURT: The affidavit says "Following the arrest he admitted that he kept additional quantities of narcotics."
>
> THE WITNESS: That is what we took it to mean. (Lines 5-15).

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*Palombo obviously misrepresented Rivudalla's "belief" to be a statement of Segura's to circumvent the necessity under Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969), of demonstrating the reliability of the informer. An arrestees' information has often been deemed untrustworthy. Wong Sun v. United States, supra.; United States v. Karathanos, 531 F.2d 26 (2nd Cir. 1976).

**Rivudalla testified that he never stated Segura had additional cocaine at his house (p. 458).

***All page citations are to the transcript of the suppression hearing.

officers that probable cause exists." Giordenello v. United States, 357 U.S. 480 (1958).

Deprived of the perjured representations, the affidavit fails to establish probable cause to believe cocaine was in the apartment. Segura's arrest is insufficient to establish the apartment as a repository for narcotics.

> "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that specific things to be searched are located on the property to which entry is sought." Zurcher v. Stanford Daily, 436 U.S. 547, 555 (1978).

Prior authority had also expressed this basic principle:

> "Search warrants may be issued only by a neutral and detached judicial officer, upon a showing of probable cause - that is, reasonable grounds to believe that criminally related objects are in the place which the warrant authorizes to be searched, at the time when the search is authorized to be conducted. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L.Rev. 348, 358 (1974).

Absent the false representations the only basis for the warrant, recited in the affidavit is Rivudalla's allegation that Segura was his supplier. This is wholly inadequate.

In United States v. Flanagan, 423 F.2d 745 (5th Cir. 1970), the fact that defendant, a known felon, had been arrested in possession of goods taken in a recent burglary and not yet recovered, coupled with the District Attorney's conclusory statement that he believed the remainder of the stolen jewelry to be concealed in defendant's residence was an inadequate basis for a search warrant. The affidavit had contained no factual observations nor other facts to indicate that the jewelry would be in defendant's residence.

United States v. Gramlich, 551 F.2d 1359 (5th Cir. 1977) held that the arrest of defendant and his admission of smuggling marijuana was an insufficient basis for a warrant to search his residence. See also: Gillespie v. United States, 368 F.2d (8th Cir. 1966), magistrate furnished information that accused possessed a gambling stamp and was engaged in gambling business, support-

This testimony clearly reveals the knowing and intentional falsity of the misrepresentations as well as Palombo's reckless disregard for the truth. Absent these perjured representations the affidavit fails to establish probable cause for a search of Apartment 3-D. Pursuant to Franks v. Delaware, 438 U.S. 154 (1978).the warrant was invalid and evidence seized from the apartment should have been excluded.

The affidavit requirement protects an individual's Fourth Amendment rights by assuring that probable cause will be determined by a neutral and detached magistrate, Johnson v. United States, 333 U.S. 10, apprised of sufficient facts upon which to make such an independant decision. Jones v. United States, 362 U.S. 257 (1960). The necessity of a sworn affidavit as a basis for the search warrant serves two purposes: (1) to ensure that the magistrate may judge for himself the persuasiveness of the precise facts, relied on to show probable cause; and (2) to provide a record upon which the reviewing court may properly determine the sufficiency of the facts presented to the magistrate to establish probable cause. Nathanson v. United States, 290 U.S. 41 (1932).

Agent Palombo's egregious conduct precluded the magistrate from exercising neutrality and detachment required by the Fourth Amendment. Had he been apprised of the agents' unlawful entry and consequent 19 hour occupation of petitioners' apartment, it is probable that the magistrate, cognizant of this violation of petitioners' rights would not have issued the warrant.

Submission of the perjured affidavit served to compound the flagrant disregard for Segura's rights illustrated by the concealment of the aforesaid facts. Having represented his own conclusions as actual statements of Rivudalla and Segura, Palombo again precluded an independant assessment of the objective facts. The agents' actions, throughout, were wholly repugnant to the Fourth Amendment.

> "There must be some basis apart from mere conclusory statements of the complaining

ed by affiant's conclusion that he had good reason to believe gambling devices were concealed at accused's residence; and United States v. Bailey, 327 F.Supp. 802 (N.D. Ill. 1977).

The case of United States v. Taylor, 599 F.2d 832 (8th Cir. 1979) is also instructive. In Taylor, supra., an agent purchased firearms from one Worley, who, though seen on these occasions outside Taylor's house, had never been observed entering or leaving the residence. The officers, thus having no indication of what transpired inside the house, did not have probable cause to believe the firearms had come from that residence and that additional firearms were contained therein. In language equally applicable to the instant case, the court stated:

> "To allege that probable cause existed to believe that firearms were located in the house of 1728 must of necessity rest on a conclusion or mere suspicion and this the Constitution forbids. We cannot employ the means of a judicial derrick to move contraband goods into a given location where, as here, the support rests solely on a conclusion or a suspicion and not founded on probable cause." Id at 837.

It is notable that in the instant case Agent Palombo, unlike the officers in Gillespie and Taylor, did not merely rely upon his own conclusions but represented those conclusions as affirmative statements of Rivudalla and Segura.

From the initial unlawful entry to the apartment to the perjured affidavit upon which the warrant and subsequent search was premised, the government's activity was illegal and in gross disregard of petitioners' Fourth Amendment rights. Deleting the perjured allegations, the affidavit contains no more than an "anemic suspicion" that cocaine would be in petitioners' apartment. United States v. Flanagan, supra.; United States v. Whitlow, 339 F.2d 975 (7th Cir. 1964). The Fourth Amendment requires the evidence seized pursuant to the warrant should have been excluded from evidence. A contrary ruling,

> . . . would reduce that Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. United States v. Flanagan, supra., at 747.

The Court of Appeals denied the petitioners' appeal in regard to this issue upon an erroneous application of the "law of the case" rule (App. C). Petitioners having prevailed on the suppression motion was not obligated to assert ancillary grounds to support the order nor was it incumbent upon petitioners to appeal that portion of the order which though adverse to them, was not determinative of that order.

The Court's reliance on McClain v. United States, 676 F.2d 915 (2nd Cir. 1982) is misplaced as in that case. The Court, in the earlier appeal, had explicitly held that the entire sentence could be vacated. In United States v. Segura supra, the Court of Appeals merely accepted the District Court's holding that the warrant was valid without undertaking any independant review of that finding. The sole focus of review was the validity of admitting the items seized subsequent to execution of the warrant, which was accepted as valid without question.

The mere reference to the issue in the prior appeal does not preclude further review. United States v. Bracewell, 569 F.2d 1194 (2nd Cir. 1978). In United States v, West, 453 F.2d 1351 (3rd Cir. 1972) defendant succeeding in having a shotgun suppressed but the court refused to suppress an inculpatory statement:

> Although the defendant has not appealed from that portion of the opinion denying his motion to suppress the statement, this will not preclude review of that ruling following conviction." Id at 1353 FN. 3

Moreover, the mere fact that petitioners could have argued the invalidity of the search warrant, in support of the suppression order, they were not required to do so. Additionally, Section 3371 under which the government appealed makes no provision for cross-appeal by the defendant. Thus petitioners did not forfeit their right to appellate review as to the validity of the warrant for appellees as they were under no obligation to raise that issue upon the government's appeal.

CONCLUSION

The warrantless entry into a dwelling and seizure of the dwelling for many hours while awaiting the contemplated issuance of a search warrant is a subject which strikes at the heart of the Fourth Amendment, and is extremely important in the administration of justice. Particularly in light of the split in the Circuits, review should be granted.

Respectfully submitted,

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APPENDIX "A"

FILED
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U.S. DISTRICT COURT E.D.N.Y.
★ MAY 19 1981 ★
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

ANDRES SEGURA,
LUZ MARINA COLON,
ENRIQUE RIVUDALLA-VIDAL and
ESTHER PARRA,

Defendants.

81-CR-80(S)

Appearances:

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BARTELS, District Judge.

Andres Segura and Luz Marina Colon were charged in an indictment, (1) with conspiring to violate 21 U.S.C. § 841(a)(1), by intentionally distributing and possessing with intent to distribute quantities of cocaine, and (2) with three substantive counts of possession with intent to distribute and distribution on February 12, 1981 of 1/2 kilo of cocaine at one time, and 1 kilo of cocaine at another. Enrique Rivudalla-Vidal and Esther Parra were charged in one count of the same indictment with possession with intent to distribute 1/2 kilo of cocaine on the same day. In an opinion delivered from the bench, hereby clarified, this Court denied one motion by two of the defendants to suppress certain evidence, and granted another motion to suppress by two other defendants.

FACTS

In January, 1981, members of the New York Drug Enforcement Task Force received information from a liaison unit that certain persons were dealing heavily in cocaine out of an apartment located at 12-10 Astoria Park South in Queens. Undertaking physical surveillance of the building,

DEA agent Palumbo and N.Y.C. Detective Frawley ascertained that the occupants of the apartment were Segura and Colon. From about January 26, 1981 until the time of their arrest, Segura and Colon were under virtually constant surveillance by the agents. On February 7, Segura and Colon were observed moving into a new apartment on 147th Street in Flushing. On February 9, Segura was observed driving in an erratic and evasive manner until finally, after making two illegal U-turns, he stopped near the intersection of 221st Street and Northern Boulevard, where Rivudalla was awaiting him in the middle of the block. Rivudalla then got into Segura's car, and engaged in a brief conversation with Segura.

On February 12, the agents trailed Segura and Colon from their 147th Street apartment to the Burger King located at 222nd Street and Northern Boulevard in Queens, and observed them enter that establishment. Not long afterwards, Rivudalla and Parra, accompanied in their car by an unidentified male, drove into the Burger King lot and parked near Segura's car. Parra and the other male remained in the car while Rivudalla entered the Burger King, and sat down at a table with Segura. Colon was seated nearby. At a certain point, the agents observed Segura motion to Colon who, after stopping for a brief word at Segura's table, then exited to the lot carrying a large shoulder bag. The bag appeared to the agents to be bulging in the middle. Colon

then entered the car in which sat Parra and the other male, and exited it shortly thereafter, "zippering-up" the shoulder bag, which the agents observed to be "noticeably smaller in bulk then when she was observed entering the car."

Colon reentered the Burger King. Rivudalla remained for a few moments with Segura, and then left, re-entered his car, and drove off. The agents also drove off in two cars after them. At a certain point Rivudalla stopped to let off his male passenger, and then proceeded to 90th Street and 34th Avenue in Jackson Heights. Both Rivudalla and Parra exited the car, and began walking towards 90-10 34th Avenue when Detective Frawley, whose car was the first at the scene, approached the pair. According, to Frawley's testimony, Rivudalla became quite nervous as soon as Frawley identified himself, and Parra seemed almost faint, her eyes watering over. Frawley asked questions of Rivudalla concerning his license and registration which, when produced, showed two different addresses.

About this time Palumbo joined the trio, and asked Rivudalla from where he had just come. Rivudalla replied first, that he had just come from home, and then changed his answer and said that he had come from his place of work on 14th Street in Manhattan. Palumbo then asked if he had just come from the Burger King on Northern Boulevard, or if he knew someone named "Andre". Rivudalla replied

negatively to both questions. Thereupon Frawley asked Rivudalla whether he had a gun, to which he replied that he did not, and allowed Frawley to pat him down.

Palumbo then turned his attention to Parra, positioning himself in front of her while Frawley was opposite Rivudalla. He asked her in Spanish whether she had a gun. She shook her head, indicating "no." He then pointed to a paper bag he had observed her clutching under her arm, and asked her whether she had a gun in the bag. Parra shook her head again, indicating "no," and then extended the paper bag towards Palumbo, briefly opening it to establish the truth of her assertion. Palumbo, standing only 2-3 feet from her, was able to look down into the bag and see a glassine envelope containing white powder. Parra quickly closed the bag, and brought it back under her arm. Palumbo then motioned to her with his finger to give the bag to him, which she did, albeit reluctantly. Looking inside again, Palumbo confirmed his original observation of the glassine bag. Rivudalla and Parra were then immediately placed under arrest. The powder was field tested by the agents, and produced a positive reading for cocaine.

Rivudalla and Parra moved to suppress the 1/2 kilo of cocaine on the ground that their arrest was invalid because of an unauthorized Terry stop, which resulted in an invalid seizure at that time of the cocaine. Segura and

Colon, for their part, moved for suppression of the 1 kilo of cocaine, a .38 revolver, considerable amounts of currency, and various narcotics records and paraphernalia because of a warrantless entry and warrantless arrest of Colon at their apartment on 147th Street in Flushing, Queens on February 12-13, 1981. A full hearing was held at which the Court heard testimony from some of the officers involved in the arrests, searches, and seizures, and from defendant Rivudalla himself.

I. The "Terry" Stop

Both Rivudalla and Parra challenge the sufficiency of the Government's basis for detaining them on the street for investigative purposes. We, therefore, turn to the law governing this stop, arrest, and seizure. The general principle which governs such a stop is that given "specific and articulable facts which, taken together with rational inferences from those facts," warrant suspicion of criminal conduct on the part of specific individuals, investigating officers may briefly detain those individuals on the street to question them about their identities or even ask that they explain "suspicious circumstances." Terry v. Ohio, 392 U.S. 1, 21 (1968); United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975). The Court finds that the agents were able to point to such facts in Rivudalla and Parra's

case.

First, the meeting on February 9, 1981 between Rivudalla and Segura in Segura's car brought Rivudalla into the ongoing surveillance operation being conducted by the Drug Enforcement Task Force with respect to Segura and Colon. Second, the suspicious conduct occurring shortly before the stop at the Burger King (to wit, the agents' having observed Colon enter Rivudalla's car with a bulging shoulder bag, and exit with that bulge no longer present), could only increase the agents' suspicions that Rivudalla and Parra were engaged in a narcotics transaction with Segura and Colon. While these circumstances might have appeared to be ordinary when viewed by a layman, the experienced agents, used to the operating procedures of narcotics traffickers, were able to draw inferences of criminal conduct requiring an investigative stop.

At the threshold, it is necessary to decide the question whether Rivudalla as well as Parra is permitted to challenge the validity of the seizure. This inquiry, once considered to be one of "standing" to contest the seizure, has recently been deemed to be "simply whether the defendant's rights were violated by the allegedly illegal search or seizure". United States v. Salvucci, 100 S.Ct. 2547, 2551 n.4 (1980). In Salvucci the Court

abandoned the "automatic standing" rule of Jones v. United States, 362 U.S. 257 (1960), and held "that defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated." 100 S.Ct. at 2549.

In the companion case of Rawlings v. Kentucky, 100 S.Ct. 2556 (1980), the Court explained that the key to resolving that Fourth Amendment inquiry was whether or not the defendant "possessed a 'legitimate expectation of privacy' in the area searched." Id. at 2561 (quoting Katz v. United States, 389 U.S. 347 (1967)). Most importantly for the purpose of this case, the Court also held that mere ownership of the property seized is insufficient to allow a defendant to challenge the search, without the further showing that the defendant "took normal precautions to maintain his privacy" in the goods he owned. 100 S.Ct. at 2561. In Rawlings the petitioner had placed certain drugs, concededly his, inside the purse of one of the occupants of the house in which he was arrested. In fact, at the time of his arrest he was seated next to that individual, and her purse was in the space between them. The Court held that the petitioner's Fourth Amendment rights had not been violated, since "the precipitous nature of the [transfer of drugs to her purse]" could not support the

inference that he maintained his privacy expectation. For one thing, petitioner did not have the right to exclude others from having access to the purse, nor had he ever "sought or received access to her purse prior to that sudden bailment." Id. And the Court held further that "even assuming ... that [the woman] did consent to the transfer of possession", the rapid, one-time transaction was not the sort of property transfer as would indicate that the petitioner had maintained his privacy expectation. Id.

Rivadulla seeks to fill in the gaps that existed in the petitioner's case in Rawlings, by an offer of proof that: a) Rivadulla was the owner of the 1/2 kilo of cocaine; b) Parra was his agent to receive the cocaine from Segura's agent Colon; c) following delivery to Parra, she was his bailee and the cocaine never left Rivadulla's sight, nor did Parra ever leave his sight; and d) that Rivadulla therefore took such precautions in excluding other people from having access to the paper bag as justify this Court's concluding that he maintained his expectation of privacy in the contents of that bag. The Court is of the opinion that even if Rivudalla had been able to establish the facts he offers to prove he would still fail to show a Fourth Amendment violation. One weakness in Rivudalla's bailment theory is that in fact it was shown that Rivudalla was not the pur-

chaser of the cocaine, but only held it on consignment from Segura.

Moreover, Rivadulla admits that at the time Colon allegedly delivered the cocaine to Parra, there was another male seated in the car with her. Rivudalla, remaining in the Burger King for a space of time following the delivery, was not in a position to exclude him from access to the paper bag. In addition, the Court of Appeals in this Circuit has held that unless an individual "signal[s] an expectation of privacy by taking special precautions to secure and secrete the contents of a container" which, like a paper bag, is "not 'inevitably' used for the transport or safeguarding of personal effects," that container is subject to a warrantless search. United States v. Mannino, 635 F.2d 110, 114 (1980) (unsecured plastic bag on car seat); accord, United States v. Markland, 635 F.2d 174, 177 (2d Cir. 1980) (closed plastic beverage bag lying on ground near overturned jeep). Quite simply, a bailment of a paper bag does not demonstrate that one has taken "normal precaution[s] to maintain [one's] privacy" under Katz and Rawlings.

Rivadulla's testimony is equivocal at best as to how the paper bag even got into his car. He is willing to state that once it did get into his car, it was "his", but this is sufficient only to show bare possession, not owner-

ship. Adopting the agents' testimony that Rivadulla failed to object to the actual seizure of the paper bag from Parra by Palumbo, the Court must conclude that Rivadulla had no expectation of privacy with respect to the cocaine in the bag held by Parra. As stated in Rawlings, "'arcane' concepts of property law ought [not] control the ability to claim the protections of the Fourth Amendment." 100 S.Ct. at 2562. While Rivadulla cannot challenge the propriety of the seizure, Parra can. The Court having decided that the police had a basis for the Terry stop, the next problem is whether they had probable cause for the arrest and search and seizure incident to that arrest. Facts quickly developed following the initial stop which matured the agents' reasonable suspicions into probable cause for the arrests. Specifically, the Court finds that the untruths told by Rivudalla when questioned concerning his whereabouts, and in particular his disclaimer of having just been at the Burger King with "Andre", coupled with the possession by Parra of a brown paper bag, Parra's and Rivudalla's extreme nervousness, and finally Parra's voluntary thrusting of the bag towards agent Palumbo in order to establish that she had no gun inside, gave the agents the probable cause they needed to arrest both Rivudalla and Parra. The turning point was the moment Palumbo glimpsed the glassine envelope with the white powder for the first time. At that juncture he was justified in

seizing the bag from Parra and placing both under arrest.

Counsel for defendant Parra has advanced the view that the questions asked by Palumbo of Parra -- specifically whether she had a gun in the paper bag -- were not related to the purpose of the stop, but were a mere ruse designed to allow him to look inside the bag for drugs. Since it is customary for those dealing in narcotics to carry guns, Palumbo was justified in asking the gun questions, even if his major purpose was to ascertain if she possessed any cocaine.

Accordingly, the motions to suppress the 1/2 kilo of cocaine are denied.

II. The Entry into the Apartment

Exigent Circumstances

Following the taking of Rivudalla and Parra into custody, Rivudalla made certain statements indicating to the agents that Segura probably possessed more cocaine in his apartment. From the statements, the agents also concluded, properly, that they had probable cause to arrest both Segura and Colon. Indeed, when Segura first contacted Rivudalla he offered to sell him one kilo of cocaine, but Rivudalla indicated he would buy only 1/2 kilo. The agents accordingly notified the Office of the United States Attorney

of the situation, and that according to Rivudalla's account, Rivudalla would be expecting a call from Segura later that same evening of February 12 to see whether the cocaine had been sold. Thereupon the agents sought, about 6:30 P.M., to obtain a search warrant for the apartment on 147th Street, so as to seize the cocaine before Segura would learn of Rivudalla's arrest and possibly destroy the cocaine in his possession.

On being informed that the lateness of the hour (6:30 P.M.) precluded them from being able to obtain a warrant until the following morning, the agents were advised by the Assistant United States Attorney to proceed directly to Segura's and Colon's apartment and arrest the pair and secure the premises pending the issuance of that warrant. They arrived around 7:30 P.M., and positioned themselves both outside the building and inside the fire stairway opening onto the third floor, the floor on which the apartment, 3D, was situated. From their fire stairway vantage point they were able to observe anyone entering or leaving 3D. While there, agent Shea of the Task Force placed his ear to the door of 3D, but heard nothing. After an uneventful three hours of waiting on the third floor, the agents inside the building joined the others outside, and all waited outside.

Around 11:15 P.M. Segura appeared, and as he began to enter the locked door at the lobby, he was apprehended, and placed in handcuffs under arrest. The agents, led by Shea, informed him that they wanted to go upstairs to 3D, to which Segura replied that he did not live in the building or in that apartment. Forcibly bringing him to the third floor, the agents began down the hallway, at which point Segura again resisted. Shea again forced him down the hallway to the door of 3D, an apartment which is located in the rear of the building, with no view of the front of the building where the arrest took place. Shea knocked on the door of 3D, with Segura standing, handcuffed, in front of him. Luz Colon, unknown to Shea at the time as such, opened the door. Detective Shea, without more, walked into the apartment with Segura in custody. He was then followed by two other agents, and five minutes later, by Palumbo. Neither Shea nor any other agent had an arrest warrant, or a search warrant. Nor did any of the officers ask for or receive consent to enter apartment 3D.

Upon entering, Shea saw, in addition to the woman they later learned to be Colon, two other women and one man. They were Ms. Alvarez, Ms. Castro, and Mr. Tobon-Castro. All were arrested forthwith. As Colon was about to be escorted out of the apartment, she indicated that she wished to take her shoulder bag with her. Thereupon Officer Prakin

of the Task Force opened it, and withdrew a leather toilet case, containing a loaded .38 revolver, which he promptly seized. The arrestees were then taken out, and driven to DEA headquarters. At least two agents remained in the building from the late hours of February 12, until around 6 P.M. the following day when they were finally notified of the issuance of a search warrant, and conducted a thorough search of the premises. There was thus a lapse of some 18-20 hours from the entry into the apartment to the execution of the search warrant, during which time the officers remained inside the apartment and in complete control of it. On searching the apartment, the agents found one kilo of cocaine, over $50,000 in U.S. currency, several rounds of .38 calibre ammunition, and records of narcotics transactions. In an earlier, cursory search of the apartment for the presence of other persons, the agents had turned up various items of narcotics paraphernalia, including a scale, jars of lactose, and a number of Baggies, all in plain view.

In the context of this background, the Court is persuaded that there was no consent to the entry of the apartment, no hot pursuit of any suspects, and no flushing of the toilet, scurrying of feet, or slamming of doors in agents' faces such as would indicate the imminent destruction of evidence. See Payton v. New York, 100 S.Ct. 1371

(1980); United States v. Gomez, 633 F.2d 999, 1007-08 (2d Cir. 1980); United States v. Levine, 500 F.Supp. 777 (W.D. N.Y. 1980). It is the Government's position that exigent circumstances existed, however, in that if the agents had not entered 3D and arrested the lessee, Colon, she would have been free to destroy any incriminating evidence or contraband during the time between Segura's arrest and the issuance of a valid warrant. The Court rejects that argument. In United States v. Agapito, 620 F.2d 324, 336 n.18 (2d Cir. 1980), the Court held that officers who arrest an individual outside of the premises may conduct a security check inside the premises only where "the arresting officers ... have (1) a reasonable belief that third persons are inside, and (2) a reasonable belief that the third persons are aware of the arrest outside so that they might destroy evidence, escape, or jeopardize the safety of the officers or the public." (Emphasis supplied.) Neither of these conditions were satisfied in this case. The agents were unaware of the presence of Luz Colon inside the apartment, based on their own surveillance of the premises from 7:30 to 10:30 P.M. Agent Shea testified, in fact, that he "did not" know whether anyone was in the apartment when he arrived, that he heard nothing when he listened, and that he was not able to see any lights on in the apartment. (Tr. at 394-96). Nor, as the Government argues, did it necessarily follow

that Colon was in the apartment just because she was not with Segura when he was arrested. One may reasonably infer that Segura's resisting the officers' wishes to go to 3D was due to his knowledge that there was cocaine in the apartment, assuming he had such knowledge, rather than that Colon was there.

As to the second condition, the third persons in the apartment only became aware of Segura's arrest when Shea knocked at the door and walked in with Segura in handcuffs. This was too late. There was no evidence whatsoever that before that moment anyone saw Segura being arrested, or even that anyone had seen Rivudalla and Parra being arrested, and communicated that information to the inhabitants of 3D. The police cannot "create their own exigencies through illegal conduct and then 'secure' the premises on the theory that the occupants would otherwise destroy evidence or flee." United States v. Allard, 634 F.2d 1182, 1187 (9th Cir. 1980).

The Government's reliance on United States v. Campbell, 581 F.2d 22, 25 (2d Cir. 1978), is misplaced. There the Court set forth the factors deemed relevant in determining whether there exists such an exigency as would justify a warrantless entry into a home. Notably absent in this case are factors numbered four and five, to wit, "strong reason to believe that the suspect is in the premises being

entered" and "a likelihood that the suspect will escape if not swiftly apprehended." The prudent course for the officers to have taken while awaiting a warrant was for them to have stationed themselves outside the apartment door, where they would not only have been able swiftly to apprehend Colon should she seek to flee, but would also have been in a position to hear the telltale signs that evidence was sought to be destroyed, signs that were not present here.

The officers in this case, absent exigent circumstances, had no right to cross the threshold of apartment 3D either to arrest Luz Colon, or to search for contraband. The entry in this case was illegal; Colon's arrest was illegal, and the search incident to that arrest, as well as the seizure of items in plain view in the apartment during a security check, was illegal. The fruits of the searches and seizures must be suppressed, to wit, the .38 calibre revolver and the narcotics paraphernalia.

Execution of the Search Warrant

The real problem in this case is the effect of the search warrant issued after the premises were illegally secured. After hearing the evidence, the Court concludes that there was sufficient information contained in the affidavit independent of any information that the agents

entered" and "a likelihood that the suspect will escape if not swiftly apprehended." The prudent course for the officers to have taken while awaiting a warrant was for them to have stationed themselves outside the apartment door, where they would not only have been able swiftly to apprehend Colon should she seek to flee, but would also have been in a position to hear the telltale signs that evidence was sought to be destroyed, signs that were not present here.

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Execution of the Search Warrant

The real problem in this case is the effect of the search warrant issued after the premises were illegally secured. After hearing the evidence, the Court concludes that there was sufficient information contained in the affidavit independent of any information that the agents

gathered at the time of the illegal entry to justify the issuance of the warrant by the magistrate. In other words, the warrant was valid. An important case governing the effect of a later, and valid warrant is United States v. Griffin, 502 F.2d 959 (6th Cir.), cert. denied, 419 U.S. 1050 (1974), where one agent sought to obtain a search warrant while other agents were dispatched to "secure" Griffin's apartment. On arriving at Griffin's apartment, the agents knocked on the door, and receiving no answer forcibly entered the premises. The agents were not in hot pursuit of anyone, and had no proof that anyone was in the apartment. Upon entry they conducted an initial seizure of items found in plain view. Four hours after the entry, during which time the agents remained in the apartment and in fact arrested one of the returning occupants, a warrant was issued and a thorough search conducted. There was no dispute that the affidavit upon which the search warrant was procured did not contain any facts discovered as a result of the initial entry. The Court held that the entry was illegal, on the ground that "police who believe they have probable cause to search cannot enter a home without a warrant merely because they plan subsequently to get one." Id. at 961. The Court found that evidence discovered pursuant to a later search must be suppressed on the ground that discovery was not "inevitable" merely because an

officer had been dispatched to obtain a warrant, and that to allow the police to proceed in such a manner "would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment." The facts in this case and the facts in Griffin are indistinguishable, since in neither case did exigent circumstances exist justifying a warrantless entry into the home.

The Court of Appeals in this Circuit has recently expressed some views on the principles here involved in the case of United States v. Alvarez-Porras, 643 F.2d 54 (2d Cir. 1981). In that case three searches were made of an apartment. One was held illegal by the district court. In the second search two hours later the Government agents had held the suspects in custody awaiting word that a search warrant, already applied for, had been issued. A distorted transmission came over the officers' portable radio which led them to believe that the warrant had been signed, pursuant to which they proceeded to search the apartment. In the course of the search they learned that the warrant had not been signed. Thereupon they temporarily discontinued the search. Later, when the warrant arrived, the third search was begun.

The Court held that the seizure of the incriminating evidence during the second search was proper since the agents

acted in good faith in trying to comply with the warrant requirement, and that the purposes of the exclusionary rule would not have been served by excluding the evidence. It stressed, however, that its decision did not rest on the broad exception for "inevitably discoverable material." Indeed, the Court relied on Griffin, supra, as an example of a case where "the purposes of the exclusionary rule were served by suppressing the evidence, lest the police be encouraged to execute warrants before they have beeen issued and before they have been properly presented to those persons at the scene of the intended search, [since] as a general matter ... [t]o allow officials to make an unlawful search and then repeat the search pursuant to a warrant would sanction the very misconduct the exclusionary rule was intended to proscribe." Further, the Court agreed that an unlawful search could not be validated simply by repeating the search pursuant to a valid warrant, citing Vale v. Louisiana, 399 U.S. 30 (1970). See Alvarez, 643 F.2d at 65.

Alvarez-Porras in no way justifies the admission of evidence seized in this case. Here the agents knew a warrant had not been issued, and accordingly the 18-20 hour delay in the issuance of the warrant, during which time the agents remained in illegal possession of the premises, rendered the execution of the warrant unreasonable within

the meaning of the Fourth Amendment, and deprived the lawful occupant of the apartment, Luz Colon, of her right freely to occupy and control the same. The evidence would not inevitably have been discovered. In fact, Colon might well have destroyed the evidence had she not been illegally excluded. The suppression of the evidence subsequently seized pursuant to the warrant would therefore serve the deterrent purposes of the exclusionary rule.

United States v. Galante, 547 F.2d 733 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977), relied on by the Government, is inapposite. In that case the chain of causation between the initial search and the subsequent seizure by the officers was broken by the intervening cooperation of the occupant, a fact not present in this case. To validate the search of the apartment under the circumstances of this case would permit Government agents to take advantage of their own wrong. The illegality of the initial entry and arrest, coupled with the unreasonableness of the delay in securing a warrant during the exclusion of Colon from her home, require the suppression of the evidence seized from that home on February 13, to wit, the kilo of cocaine, the currency, the .38 ammunition, and the narcotics records. The motions to suppress of Segura and Colon are hereby granted.

The foregoing constitutes the Court's findings of fact and conclusions of law as required by Rule 12(e), F.R.Cr.P.

SO ORDERED.

Dated: Brooklyn, N.Y.,
May 15, 1981.

John R. Bartels
United States District Judge

APPENDIX "B"

663 F.2d 411 (2nd Cir 1981)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1711—September Term 1980

(Argued: August 13, 1981 Decided: November 6, 1981)

Docket No. 81-1181

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

—against—

ANDRES SEGURA and LUZ MARINA COLON,

Defendants-Appellees.

Before:

MESKILL and KEARSE, *Circuit Judges,*
and COFFRIN, *District Judge.**

Appeal by the United States pursuant to 18 U.S.C. § 3731 from order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge,* suppressing evidence seized from defendants' apartment.

Affirmed in part and reversed in part.

* Honorable Albert W. Coffrin, of the United States District Court for the District of Vermont, sitting by designation.

PETER A. CHAVKIN, Assistant United States Attorney, Brooklyn, New York (Edward R. Korman, United States Attorney for the Eastern District of New York, Vivian Shevitz, Assistant United States Attorney, on the brief) *for Appellant.*

PAUL E. WARBURGH, JR., New York, New York (Axelrod & Warburgh, New York, New York, on the brief), *for Appellee Andres Segura.*

PETER J. FABRICANT, Brooklyn, New York, *for Appellee Luz Marina Colon.*

KEARSE, *Circuit Judge:*

The United States appeals from an order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge*, suppressing evidence seized by law enforcement officials from the apartment of defendants-appellees Andres Segura and Luz Marina Colon, who are charged in four counts of a five-count indictment with conspiracy to commit an offense under the narcotics laws in violation of 21 U.S.C. 846 (1976), and with possession and distribution of cocaine in violation of 21 U.S.C. § 841(a)(1) (1976). Some of the evidence seized from the apartment was discovered prior to the issuance of a search warrant and some was discovered in the search that followed issuance of the warrant. We affirm the district court's suppression of the pre-warrant evidence, but reverse the order to the extent that it suppressed evidence discovered after the issuance of the search warrant.

FACTS

In January 1981, members of the New York Drug Enforcement Task Force ("Task Force"), having received information relating to heavy trafficking in cocaine, had begun a virtually constant surveillance of Segura and Colon. On

February 12, at approximately 5:00 p.m., Task Force agents followed Segura and Colon to a Burger King in Queens, where they observed Segura and Colon effect what appeared to be the delivery of a bulky item to Enrique Rivudalla-Vidal and Esther Parra. The agents followed Rivudalla and Parra, and at approximately 5:30 stopped them for questioning. Upon learning that a paper bag carried by Parra contained a glassine bag of white powder, the agents placed Rivudalla and Parra under arrest. The white powder was eventually determined to be approximately one-half kilogram of cocaine. After being advised of his constitutional rights, Rivudalla stated that he had received the cocaine from Segura. He added that they had originally planned a one kilogram sale, but that he had requested the smaller quantity because he was unsure of his ability to sell a full kilogram, and that Segura was to telephone him at approximately 10 p.m. to learn whether he had been successful in selling the half kilogram.

At approximately 6:30 p.m., one of the agents telephoned an Assistant United States Attorney for the Eastern District of New York to request permission to arrest Segura and Colon and authorization to search their apartment. The Assistant authorized the arrests, but stated that a search warrant was unobtainable that evening and instructed the agent merely to secure the apartment without searching it.

At 7:30 p.m. three agents, led by Special Agent Patrick Shea of the United States Drug Enforcement Agency ("DEA"), who was assigned to the Task Force, set up surveillance of the defendants' apartment from the fire stairs near the door of the apartment, 3D. At that time the agents had no reason to believe anyone was inside the apartment. No lights were visible. Shea pressed his ear to the apartment door, but heard no sounds from within. Segura's car was not parked in the vicinity. For nearly three hours no one entered or left the apartment as the agents watched from the fire stairs. At about 10:30 the agents left the fire stairs to set up surveillance outside the building.

At approximately 11:15 p.m. Segura entered the building alone. The agents followed him into the vestibule and, as he unlocked the inner door, arrested him. Agent Shea told Segura they were going to "go up to the apartment." Segura denied living in the building, but the agents forcibly took him to apartment 3D. Shea knocked on the door, which was answered by a woman later identified as Colon. Shea showed his badge and told Colon that Segura had been arrested and that a search warrant was being obtained; then he and the other agents and Segura entered the apartment. The agents neither requested nor received permission to enter.

Once inside, the agents discovered three other persons present with Colon. Two of the agents immediately conducted a security check to ensure that no one else was present who might constitute a threat to their safety or destroy evidence. During this limited inspection they discovered a triple-beam scale and several jars of lactose in plain view on a bedroom table and numerous small cellophane bags in a bedroom closet.

Eventually, Colon was placed under arrest, and she, Segura, and the other three persons found in 3D were taken to DEA headquarters. As Colon was preparing to depart, she sought to take her shoulder bag with her. Before permitting this, one of the agents searched the bag for a weapon and discovered a loaded .38 caliber revolver and more than $2,000 in cash.

Two agents remained in the apartment to secure it until a search warrant was issued. Because of "administrative delays," application for the warrant was not presented to a magistrate until approximately 5 p.m. the following day. The warrant was issued and then executed at about 6 p.m., some nineteen hours after the intitial entry. In the search pursuant to the warrant agents discovered 1,250 grams of cocaine in an attache case, 58 grams of cocaine in the pocket of a coat in the bedroom closet, 18 rounds of .38 caliber ammunition, more than $50,000 in cash, and records of narcotics transactions. The agents seized all of these items, together with

the items discovered during the security check of the previous night.

This prosecution followed. Segura and Colon moved to suppress the items seized from their apartment on the ground that the entry and search violated their rights under the Fourth Amendment to the Constitution. The government contended that the entry into the defendants' apartment was justified by exigent circumstances because the agents feared Colon would destroy the evidence they believed was there before a search warrant could be obtained. After an evidentiary hearing, the district court ruled that the entry was not justified. Further, the court concluded that although the search warrant eventually obtained was valid, all of the evidence seized should be suppressed because the 19-hour delay made execution of the warrant unreasonable and because had it not been for the unlawful entry, the evidence seized might not have been there 19 hours later.

The government has appealed, as permitted by 18 U.S.C. § 3731 (1976), and renews here its contention that exigent circumstances justified the entry. In the event that we reject this argument, the government urges that we reverse the suppression of evidence other than the gun since that evidence was not "seized" until after issuance of the search warrant, or, alternatively, that we reverse the suppression order insofar as it related to evidence discovered after issuance of the warrant.

DISCUSSION

We conclude, on the authority of *United States v. Agapito*, 620 F.2d 324 (2d Cir.), *cert. denied*, 449 U.S. 834 (1980), that the entry was not justified, but that the evidence discovered pursuant to the valid search warrant should not have been suppressed.

A. *The Entry*

It is fundamental that warrantless searches and seizures are unreasonable within the meaning of the Fourth Amend-

ment unless they fall within one of the few, well-delineated exceptions to the warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). The government argues that the warrantless entry of the Task Force agents into the apartment of Segura and Colon to prevent the destruction of evidence was lawful under an exception for "exigent circumstances." Although this Circuit has upheld a warrantless entry into an apartment for the purpose of preventing the destruction of evidence, *United States v. Vasquez*, 638 F.2d 507, 529-32 (2d Cir. 1980), we conclude that the prerequisites for such an entry were not met in the present case.

The preconditions that will justify a warrantless entry into premises, following an arrest outside, for a security check to prevent the destruction of evidence were set forth by this Court in *United States v. Agapito*, *supra*. There we stated that

> the arresting officers must have (1) a reasonable belief that third persons are inside, and (2) a reasonable belief that the third persons are aware of the arrest outside the premises so that they might destroy evidence, escape or jeopardize the safety of the officers or the public.

620 F.2d at 336 n.18. In *Agapito*, DEA agents had conducted a two-day surveillance of a 17th floor hotel room, following which they arrested, in the hotel lobby, the only two persons believed to have occupied the room. After the arrests the agents entered the room and seized a suitcase; they remained in the room intermittently for nearly twenty-four hours until a search warrant was obtained. We found that the actions of the agents satisfied neither prerequisite for a warrantless security check. First, the agents had no reason to believe that third persons were in the room, since their surveillance of the room had not revealed the presence of any occupants or visitors whom they had not already apprehended. Second,

the arrest of the occupants had taken place in the hotel lobby, seventeen floors removed from the room.

> Thus, even if the agents here thought that accomplices remained in the room, there was no reason for them to believe that the accomplices knew of the arrests so that they might destroy evidence . . . .

Id. at 336. Hence we held that the entry into the hotel room was unlawful.

Despite the differences in times and distances, we find no material distinction between *Agapito* and the present case. The Task Force members in the present case had kept apartment 3D under surveillance for some three hours, during which they had seen no lights, heard no sounds, even with an ear pressed against the door, and seen no person entering or leaving. They had no reasonable belief that anyone was in the apartment. We are unpersuaded by the government's argument that Segura's arrival at home alone made it reasonable to believe that Colon was already at home. She could as easily have been elsewhere, especially since there had been no signs whatever that 3D was occupied. Nor is there reason to reach a contrary conclusion on the basis of the government's argument that Segura might have learned, through his expected 10 o'clock call to Rivudalla or otherwise, that Rivudalla had been arrested. The surveilling agents heard no sound of a telephone ringing in 3D nor any other activity to suggest that anyone had communicated that information to Colon.

Even if Segura's arrival alone made it reasonable to suspect that Colon was in 3D, there was no reason to believe that anyone in the apartment knew of Segura's arrest and was therefore about to destroy evidence. The arrest took place in the lobby of the apartment building, two floors below the apartment. The arrest could not have been observed from 3D, and there was no evidence that anyone saw the arrest and reported it to the inhabitants of 3D.

The government nonetheless attempts to bring the agents'

actions within the second *Agapito* prerequisite by arguing that their knock at the door of 3D, along with the preceding commotion as they forcibly brought Segura to the apartment, alerted the inhabitants of the apartment to Segura's arrest and made it likely that they would destroy whatever evidence was there. Such exigency as inhered in these conditions, however, was of the agents' own making. They had no need to drag Segura to his apartment or to knock at the door. We will not expand the exception made for emergency security checks by permitting the agents to "create their own exigencies . . . and then 'secure' the premises on the theory that the occupants would otherwise destroy evidence." *United States v. Allard*, 634 F.2d 1182, 1187 (9th Cir. 1980); *United States v. Rosselli*, 506 F.2d 627, 630 (7th Cir. 1974) (agents' knocking at door, creating emergency, did not exempt them from warrant requirement: "when the emergency justification is advanced, we believe it is appropriate to appraise the agents' conduct during the entire period after they had a right to obtain a warrant and not merely from the moment when they knocked at the front door.")

The government's reliance on our decision in *United States v. Vasquez, supra*, in which we upheld a warrantless entry for a security check, is misplaced since that decision was based on several facts that are not present here. First, the pertinent arrests in *Vasquez* took place on the street, within sight of the fourth-floor apartment in question, thus creating the risk at the outset that the arrests were known to those remaining in the apartment. Further, the circumstances in *Vasquez* made it quite reasonable for the agents to believe that someone remained in the apartment. And finally, one of the persons arrested on the street led the officers to an apartment on the second floor and attempted to have the occupant of that apartment give a false story on his behalf; the second-floor occupant became hysterical and the ensuing commotion could not help but alert anyone remaining in the fourth-floor apartment. The commotion in *Vasquez* thus was not instigated by the agents' tactics but by the arrestee's deceit.

In the present case, we agree with the conclusion of the district court that a warrantless entry of 3D to conduct a security check was not justified by the circumstances and that that entry was therefore unlawful.

B. *The Post-Warrant Evidence*

Leaving aside for the moment the question of the evidence discovered upon the unlawful entry into the apartment, *see* C. *infra*, we turn to the question of the evidence discovered in the apartment after the issuance of the search warrant. The district court found that the warrant itself was valid, but ruled that the illegality of the initial entry, coupled principally with the unreasonableness of the delay in obtaining the warrant, required the suppression of the evidence discovered after the warrant was issued. We conclude that our prior decision in *United States v. Agapito*, *supra*, is controlling and requires the contrary result.

As discussed earlier, the agents in *Agapito* sought to justify their warrantless entry into a hotel room as a security check to prevent the destruction of evidence. We found the facts insufficient to justify a security check and ruled their entry unlawful. Notwithstanding the purported desire of the *Agapito* agents to make a quick security check, when they found the hotel room empty they did not simply secure it until a search warrant could be obtained; they "moved in" and remained there intermittently for nearly twenty-four hours before a warrant was obtained. During their unlawful stay in the room the agents seized a suitcase, although they did not at that time open it or otherwise search the room. Eventually a search warrant, which we held to be valid, was issued. Upon issuance of the warrant the agents searched the suitcase and discovered one kilogram of cocaine. Notwithstanding the illegal entry, the 24-hour delay in obtaining a warrant, and the agents' unlawful occupation of the room for that lengthy period, we held that the cocaine found in the suitcase should not be suppressed because the cocaine was discovered pursuant to a valid search warrant.

We find no difference in the facts of the present case sufficient to justify deviation from the result reached in *Agapito*. Here, as there, there was an unlawful entry in circumstances that did not justify the intended security check of the premises; here the agents remained unlawfully on the premises for nineteen hours prior to issuance of a search warrant, as compared with twenty-four in *Agapito*; here there was a valid warrant, as there was in *Agapito*; and here, as there, we deal with evidence discovered after the valid warrant issued.

The only difference between the present case and *Agapito* is that in *Agapito* the hotel room was empty, whereas there were people in the Segura-Colon apartment, a difference we do not consider material. The district court gave effect to this difference by hypothesizing that, had there been no illegal entry, Colon and her companions might have destroyed the evidence in the apartment prior to the issuance of the warrant. The hypothesis that had it not been for the unlawful entry perhaps no evidence would have been discovered lawfully is unpersuasive, in part because it is based on wholly speculative assumptions, such as (1) that having decided not to enter the apartment until a warrant was obtained, the agents would nevertheless have taken Segura to the apartment and alerted Colon; or (2) that having decided not to enter prior to obtaining a warrant the agents would not have kept the apartment under surveillance; or (3) that, once alerted, Colon would have sought to eliminate the evidence (including valuable cocaine and more than $50,000 in cash) by destroying it within the apartment rather than by removing it from the apartment, so that the agents would have no opportunity to intercept persons removing evidence; or (4) that the destruction of nearly three pounds of cocaine, more than $50,000 in cash, numerous cellophane bags, and documents would be achieved without the telltale sounds of repeated toilet flushings or an odoriferous fire; or (5) that a triple-beam scale and eighteen rounds of ammunition could be destroyed silently.

Further, we cannot uphold the district court's decision to penalize the unlawful entry simply on the basis that persons were in the apartment who might otherwise have destroyed the evidence, because we find such a basis prudentially unsound. Under Fourth Amendment jurisprudence the fact that such persons were present—meaning that the agents happened to be correct in one of the unsupported beliefs that led them to enter—does not legitimate the agents' entry; the reasonableness of the entry turns on the objective reasonableness of the beliefs, not on their accuracy. The effect of the district court's ruling, however, would be not only to preclude the officers' reliance on their happenstance accuracy, but in fact to penalize them for that accuracy. That is, upholding the district court's decision would mean that we suppress the evidence when, as here, the agents happened to be right in believing that there was someone in the premises to destroy it, while we do not suppress it where, as in *Agapito*, the agents' belief turned out to be wrong. We do not believe the appropriate protection of Fourth Amendment rights requires such an ironic twist.

In sum, *Agapito* is virtually indistinguishable from the present case and requires that the evidence discovered pursuant to the issuance of the valid search warrant not be suppressed.

C. *The Pre-Warrant Evidence*

Finally, we reject the government's argument that the evidence discovered during the unlawful security check should not be suppressed because it was not actually "seized" until after the search warrant was obtained. While *Agapito* allows use of evidence discovered after the issuance of a valid search warrant, it does not forbid suppression of evidence discovered upon an unlawful entry prior to the issuance of the warrant. We are not inclined to extend *Agapito* to allow use of the unlawfully discovered pre-warrant evidence in this case where the agents literally and figuratively went out of their way to create the circumstances that

they contend constituted the emergency justifying entry. In the words of *United States v. Rosselli, supra*, in which agents similarly knocked at the suspects' door and thus alerted them,

> [w]e do not suggest that the emergency which did develop was contrived by the agents. They had a right to pursue their investigation by seeking voluntary cooperation from a suspect. But certainly the emergency which did ensue was foreseeable. Moreover, this type of situation may reoccur repeatedly and might lend itself to too easy a by-pass of the constitutional requirement that probable cause should generally be assessed by a neutral and detached magistrate before the citizen's privacy is invaded.

506 F.2d at 630. Given the potential for abuse of the emergency security check exception by officers who would create their own emergencies, we believe it appropriate " 'to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' " *Brown v. Illinois*, 422 U.S. 590, 599-600 (1975), quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960). Accordingly, we uphold the suppression of such evidence as was discovered upon the unlawful entry.

CONCLUSION

The order of the district court is affirmed insofar as it suppressed items discovered prior to the issuance of the search warrant, and reversed insofar as it suppressed items discovered after issuance of the warrant.

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APPENDIX "C"

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the day of one thousand nine hundred and eighty-two.

Present: HONORABLE JAMES L. OAKES,

HONORABLE THOMAS J. MESKILL,

HONORABLE AMALYA L. KEARSE,

Circuit Judges,

UNITED STATES OF AMERICA,

Appellee,

- v. -

ANDRES SEGURA and LUZ MARINA COLON,

Defendants-Appellants.

Nos. 82-1062, 82-1064

82-1062
82-1064

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Defendants Andres Segura and Luz Marina Colon appeal from judgments entered in the United States District Court for the Eastern District of New York, after a jury trial before John R. Bartels, Judge, convicting them of conspiring to distribute cocaine, in violation of 21 U.S.C. § 846 (1976), and of distributing and possessing with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). Finding no merit in any of their contentions on appeal, we affirm.

1. Defendants contend that various items found in their apartment and admitted at trial should have been suppressed because they were seized pursuant to a search warrant that was invalid in that it was procured on the basis of material

misrepresentations. This issue is foreclosed by reason of our prior ruling in this case in United States v. Segura, 663 F.2d 411 (2d Cir. 1981). On the prior appeal, the government sought to overturn a ruling of the district court suppressing all evidence seized in the apartment of Segura and Colon. The district court had ruled the search warrant valid, but had suppressed all evidence seized in the apartment on the ground that the initial entry of the government agents had been unlawful. The government requested a reversal as to all of the evidence seized, on the ground that the initial entry was necessitated by exigent circumstances, or alternatively a reversal as to some of the evidence, on the ground that it was discovered and seized pursuant to a valid search warrant issued after the initial entry. Notwithstanding that the validity of the warrant was the linchpin of the government's "fallback" position, the defendants never argued that the search warrant was invalid, although they were entitled to make such an argument in support of the suppression order. United States v. Swarovski, 557 F.2d 40, 49 (2d Cir. 1977) (citing Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970)), cert. denied, 434 U.S. 1045 (1978); see Smith v. Phillips, 102 S. Ct. 940, 945 n.6 (1982). Even after we accepted the government's alternative contention by reversing the suppression of the evidence seized after the issuance of the warrant, Segura and Colon did not challenge the validity of the warrant. They moved for rehearing, but asked that we reconsider our ruling allowing use of "the evidence discovered pursuant to the valid search warrant" solely on the ground that the case we had found controlling, United States v. Agapito, 620 F.2d 324 (2d Cir.), cert. denied, 449 U.S. 834 (1980), had been wrongly decided. (Petition of Segura and Colon for Rehearing, filed November 20, 1981, at 2.) Since Segura and Colon had adequate opportunities on the prior appeal to present their contentions as to the validity of the search warrant, we see no reason not to rule that our prior decision as to that issue is the law of the case. See McClain v. United States, 676 F.2d 915, 917 (2d Cir. 1982).

Even if the attack on the validity of the warrant were not foreclosed, however, we would reject it for lack of merit. Defendants have pointed to no evidence to suggest that the district court should have found the misstatements in the affidavit seeking issuance of the search warrant to be deliberate or reckless falsehoods. See Franks v. Delaware, 438 U.S. 154, 171-72 (1978). The misstatements alleged were the agent's interpretations of statements made to him, and his interpretation of Segura's use of the term "stuff" as referring to narcotics was consistent with common usage in the trade. See, e.g., United States v. Beltempo, 675 F.2d 472, 475 (2d Cir. 1982); United States v. Martino, 664 F.2d 860, 874 (2d Cir. 1981). The district court's implicit ruling that the variance between statements and interpretations was not material is not clearly erroneous.

2. Segura and Colon also contend that the evidence at trial was insufficient to support their convictions. The evidence included (1) the government agents' observations of a meeting between Segura and Enrique Rivdulla at a restaurant at which neither they nor anyone accompanying them obtained food; Segura's gesture to Colon who then left the restaurant with a bulging pocketbook, entered the automobile of Rivdulla, and

emerged moments later with no bulge in the purse; and the arrests minutes later of Rivdulla and his companion with a half kilogram of cocaine; and (2) the items found in the apartment of which Segura and Colon were co-lessees, including one kilogram of cocaine, $56,000 in cash, and a notebook apparently recording transactions with, inter alios, "Enrique." Viewing the evidence in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80 (1942), we conclude that a rational juror could have concluded beyond a reasonable doubt that each defendant was guilty of conspiracy to distribute cocaine and of distribution of, and possession with intent to distribute, cocaine.

The judgments are affirmed.

JAMES L. OAKES

THOMAS J. MESKILL

AMALYA L. KEARSE,
Circuit Judges

IN THE SUPREME COURT OF THE UNITED STATES

----------x

ANDRES SEGURA and LUZ MARINA COLON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

----------x

AUG 27 1982

OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION TO PROCEED IN FORMA PAUPERIS

82-5298

Petitioners, Andres Segura and Luz Marina Colon, move this Court for permission to file the petition for a Writ of Certiorari and to further proceed in the Supreme Court of the United States in forma pauperis. The annexed affidavits of Paul E. Warburgh, Jr., Esq., and Peter J. Fabricant, Esq., support the motion.

AXELROD & WARBURGH
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(212) 689-8970

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Attorney for Colon
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TO:

EDWARD R. KORMAN, ESQ.
United States Attorney for the
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Solicitor General of the United States
United States Department of Justice
Washington, D.C. 20530

IN THE SUPREME COURT OF THE UNITED STATES

ANDRES SEGURA and LUZ MARINA COLON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

PETER J. FABRICANT, being duly sworn, deposes and says:

1. I am the attorney for the petitioner Luz Marina Colon. She was convicted in the United States District Court for the Eastern District of New York and her conviction was affirmed by the Court of Appeals for the Second Circuit. I am filing herewith a petition for a writ of certiorari to review the judgment in the Second Circuit.

2. I represented petitioner in the Second Circuit as assigned C.J.A. counsel. The appeal there proceeded in forma pauperis. I am aware of nothing which has changed her financial status, particularly since the petitioner has been incarcerated since her trial. Leave to proceed in forma pauperis in this Court should be granted as well.

Peter J. Fabricant
PETER J. FABRICANT

Sworn to before me this
26th day of August, 1982.

Immacolata Carpinelli

IMMACOLATA CARPINELLI
Notary Public, State of New York
No. 41-4704120
Qualified in Queens County
Commission Expires March 30, 1983

IN THE SUPREME COURT OF THE UNITED STATES

ANDRES SEGURA and LUZ MARINA COLON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

PAUL E. WARBURGH, JR., being duly sworn, deposes and says:

1. I am the attorney for the petitioner Andres Segura. He was convicted in the United States District Court for the Eastern District of New York and his conviction was affirmed by the Court of Appeals for the Second Circuit. I am filing herewith a petition for a writ of certiorari to review the judgment in the Second Circuit.

2. I represented petitioner in the Second Circuit as assigned C.J.A. counsel. The appeal there proceeded in forma pauperis. I am aware of nothing which has changed his financial status, particularly since the petitioner has been incarcerated since his arrest. Leave to proceed in forma pauperis in this Court should be granted as well.

Paul E. Warburgh Jr.

PAUL E. WARBURGH, JR.

Sworn to before me this
26th day of August, 1982.

Immaculata Carpinelli

IMMACOLATA CARPINELLI
Notary Public, State of New York
No. 41-4704120
Qualified in Queens County
Commission Expires March 30, 1983